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No. ~~362~~ 15

In the Supreme Court of the United States

OCTOBER TERM, 1956

PUBLIC SERVICE COMMISSION OF UTAH AND UTAH CITIZENS RATE ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered June 13, 1956, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. That order required appellee rail carriers

to increase their intrastate freight rates in Utah to the level of interstate rates.

Following the nation-wide increase in interstate freight rates ordered by the Commission in *Ex Parte 175* (*Increased Freight Rates, 1951*, 284 I.C.C. 589), the railroads operating in Utah petitioned the Public Service Commission of Utah for comparable increases in intrastate freight rates. The Utah Commission dismissed their petition for failure to produce the kind of evidence as to their intrastate operations which Utah law requires. The carriers then petitioned the Interstate Commerce Commission to increase the intrastate rates to the interstate levels. After full administrative proceedings, the Commission determined that intrastate rates unjustly discriminated against interstate commerce, and authorized the increases (with minor exceptions). *Utah Intrastate Freight Rates and Charges*, 297 I.C.C. 87.

On review, the three-judge district court (one judge dissenting) sustained the order. Noting that the adequacy of the findings had not been challenged, the court nonetheless considered the "voluminous record," and it concluded that the findings were supported by substantial evidence.

ARGUMENT

Section 13(4) of the Interstate Commerce Act authorizes the Commission to prescribe new intrastate rates where it finds that existing intrastate rates either unjustly discriminate against, or cause undue preference or prejudice against persons or localities in, interstate commerce. In *King* v. *United States*, 344 U. S. 254, the Court held (pp. 270-271) that a Commission

order, which increased Florida intrastate rates to the interstate rate level in order to remove unjust discrimination against interstate commerce, was adequately supported by findings (1) that intrastate rates were abnormally low and were not contributing their fair share to the carriers' revenues; (2) that transportation conditions incident to the intrastate transportation of freight in Florida were not more favorable than those incident to interstate movement; (3) that the increased intrastate rates would not exceed a just and reasonable level; and (4) that the increased intrastate rates would substantially increase the carriers' revenues and would not contribute more than a fair proportion to their total income. In the instant case, the Commission made similar findings,[1] and there is no challenge to their adequacy to support the order.

Appellants' principal contention is that there is inadequate evidentiary support for the finding that conditions incident to intrastate freight transportation are no more favorable than those incident to interstate movement. Experienced railroad personnel testified without contradiction that intrastate traffic in Utah and interstate traffic moving to or through points in Utah are handled in the same manner by the same

[1] The Commission found (297 I.C.C. at 105-106), *inter alia*, that conditions incident to intrastate freight transportation in Utah were not more favorable than those incident to interstate transportation between Utah and adjoining States; that present interstate rates are just and reasonable; that Utah intrastate rates (with minor exceptions) were abnormally low, failed to produce a fair share of required earnings, and cast an undue burden upon interstate commerce which would be removed by applying the same increases received by interstate rates; and that the higher intrastate rates will not be unreasonable and will substantially increase the carriers' revenues.

crews in the same trains utilizing the same yard facilities, and that no distinction is made in the handling, loading or unloading of the two types of freight. The court below, after considering this evidence, concluded that it adequately supported the Commission's finding as to similarity of transportation conditions; and that this finding, coupled with data as to economic conditions in Utah,[2] in turn supported the Commission's conclusion that "[t]he cost of handling an intrastate shipment [is] . . . as great, if not greater, than the handling of interstate freight." (Jurisdictional Statement, p. 60; see 297 I.C.C. at 103.)

Similar evidence has many times been held to support the finding that transportation conditions are no more favorable on intrastate traffic than on interstate traffic. See, *e.g., New York* v. *United States*, 98 F. Supp. 855 (N.D.N.Y.), affirmed, 342 U. S. 882; *South Carolina* v. *United States*, 136 F. Supp. 897 (E.D.S.C.), affirmed, 351 U.S. 944. Appellants assert, however, that such evidence is insufficient in this case because of statistics purporting to show that traffic density (ton-miles carried per mile of track) on intrastate traffic is heavier than on interstate traffic. (Jurisdictional Statement, p. 9.) The Commission carefully considered these data (297 I.C.C. at 103), but found them unpersuasive because the density figures had been based solely upon main-line track mileage, and ignored the

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[2] "Wages were higher than the national average; higher wages and costs of operation which the railroads had to pay in Utah and elsewhere, were shown; there had been a substantial increase in property investments of railroads operating within the state, while there was a decrease in net operating income." (Jurisdictional Statement, 59-60).

branch-line mileage of the railroads. Since the record shows, as the Commission found (297 I.C.C. 91), that 80% of intrastate carload traffic consists of mine products which, the record shows, originate on branch lines, the Commission's conclusion that "[t]he density results would be substantially reduced if branch-line mileage were included" and hence that "[t]he comparisons thus made are of little significance," is a reasonable one.

Appellants apparently contend that the language of this Court in *Illinois Commerce Commission* v. *United States*, 292 U. S. 474,[3] requires the Commission to find that *all* aspects of interstate and intrastate traffic are identical—not merely that conditions incident to the transportation of such traffic are subsantially similar[4] —before it may issue an order under Section 13(4) removing discrimination against interstate commerce. Under such a theory, a difference in density would preclude issuance of a Section 13(4) order. But we submit that the *Illinois* decision imposes no such rigid formula upon the Commission. Otherwise, the Commission would be required to develop a *rate* case for each particular category of intrastate traffic covered by a gen-

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[3] "Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues." 292 U.S. at 483-484.

[4] But see 292 U.S. at 485: "The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions."

eral increase in intrastate rates which is designed to relieve a burden on interstate *revenues*. This Court has made it clear, however, that "[i]t is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case." *King v. United States*, 344 U. S. 254, 275. We submit that the court below correctly held that the Commission's finding as to similarity of transportation conditions of interstate and intrastate traffic is supported by substantial evidence on the whole record.

Appellants' other contentions (Jurisdictional Statement, 11-13) also relate to the sufficiency of the evidence. Each of these was fully presented to, and rejected by, both the Commission and the court below, and there is no occasion for further review of these evidentiary questions by this Court.

As this Court has indicated, the initial reviewing court has "primary responsibility" (*National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498, 502) for deciding "[w]hether on the record as a whole there is substantial evidence to support agency findings." The Jurisdictional Statement reveals nothing to make this case that "rare instance" where the reviewing court "misapprehended or grossly misapplied" the governing criteria (*Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 491), nor any other special circumstance which might warrant a second reanvassing of this record. See *New England Divisions Case*, 261 U. S. 184, 203, 204; *Radio Corp. v. United States*, 341 U. S. 412, 415. The bare presence in the record of evidence upon which a different trier of fact might have reached a contrary conclusion does not warrant the overturning of the Commission's order. See *United States v. Detroit Naviga-*

tion Co., 326 U. S. 236, 241; *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 536.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

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SEPTEMBER 1956.

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[5] Appellants also list as a question presented whether a collateral attack may be made in this action on the Commission's earlier *Ex Parte 175* order. They do not, however, argue the point. In any case, as the court below correctly held (Jurisdictional Statement, 30a), "[t]he validity of the Commission's order in *Ex Parte 175* is not subject to collateral attack." See *Callaghan Road Co. v. United States*, 345 U.S. 507, 512; *Securities & Exchange Commission v. Central-Illinois Securities Corp.*, 338 U.S. 96, 143.

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